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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 768

WILLIAM J. SULLIVAN AND
GEORGIA K. SULLIVAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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Petitioners respectfully request that this Court grant rehearing of its order denying certiorari; and that the Court now grant certiorari, vacate the judgment below, and remand the case to the Court below so that a question which has not been passed upon may be decided.

In the District Court and in the Court of Appeals for the Eighth Circuit, petitioners contended that since the stock redemption was accompanied by a partial liquidation of the corporation, there could be no dividend to petitioner. Sections 346 (b) and 331, Internal Revenue Code of 1954. Though this question was presented to the Court below on brief and in the petitions for rehearing, the Court's opinion

contains no reference whatsoever thereto. The Court did not consider or decide this issue.

Sections 346 (b) and 331 prohibit the treatment of any payout in redemption as a dividend. (See petition for certiorari, pp. 22-26; petitioners' "reply" p. 9.)

Section 346 (b) was intended by Congress to clarify the 1939 Code by segregating the test of whether there had been a contraction or partial liquidation of the corporation from the "dividend equivalency" test. *United States* v. *Carey*, 289 F.2d 531, 536 (C.A. 8th, 1961); *Sorem* v. *C.I.R.*, 334 F.2d 275, 279-280 (C.A. 10th, 1964); *McCarthy* v. *Conley*, 341 F.2d 948, 951 (C.A. 2nd, 1965); *The Law of Federal Income Taxation* (Mertens), Vol. I (Zimet Ed.), Sec. 9.70, p. 134; *Code Commentary* (Mertens), Sec. 346, p. 178. By statute, transactions under Section 346 (b) are "not essentially equivalent to a dividend". Section 346 (b); S. Rep. No. 1622, 83rd Cong., 2nd Sess., 3 U.S. Code Cong. and Adm. News (1954), p. 4900; *United States* v. *Carey*, supra, p. 536; *McCarthy* v. *Conley*, supra, p. 955.

The Court below (opinion p. 6) relied on Sections 301 and 302 of the 1954 Code. Since the stock redemption here was accompanied by a partial liquidation under Section 346 (b)—as a matter of law—neither Section 301 nor 302 is applicable. (Where Section 346 applies, any distribution is governed by Section 331 and that Section (and the regulations) specifically provide that Section 301 is not applicable. Moreover, if a distribution falls under both Sections 302 and 346, only the latter provision is applicable. Section 346 (c); Regulations Sec. 1.346-2; *Code Commentary* (Mertens), Section 346 (c): 1, p. 183. Without Section 301 there can be no dividend.

The Court below in *United States* v. *Carey*, supra, p. 536, specifically recognized the relationship of Sections 346 and 331 to Sections 301 and 302.

The decision of the Court of Appeals is plainly erroneous since it is contrary to the statutes. If permitted to stand, the judgment of the Court below completely frustrates the intent of Congress in enacting Sections 346 and 331. Moreover, since the Court has not decided this question, petitioner has been deprived of his right of appellate review.

There is ample authority and precedent for this Court to remand a case to a Court of Appeals where a question has not been decided by that Court. 28 U.S.C., Sec. 2106; *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 468 (1947); *Dean Milk Co.* v. *City of Madison, Wis.*, 340 U.S. 349, 357 (1950); *Swanson* v. *Traer*, 354 U.S. 114, 117 (1957); *C.I.R.* v. *Duberstein*, 363 U.S. 278, 293 (1960); *Nolan* v. *Transocean AirLines*, 365 U.S. 293, 295 (1961); *Leonard* v. *United States*, 378 U.S. 544 (1964); *Redmond* v. *United States*, 384 U.S. 264, 265 (1966).

The present record is sufficient for consideration and decision; consequently, further hearing will not be required. The question is solely one of law and is dispositive of the case.

For the reasons set forth in this petition for rehearing, as well as in the petition for certiorari, rehearing and certiorari should now be granted, the judgment below should be vacated, and the case remanded to the Court of Appeals for the Eighth Circuit for decision on this question.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

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